KOH SIAK POH

v.

PERKAYUAN O.K.S. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
V.C. GEORGE J
[CIVIL SUIT NO. C 2183 OF 1984]
19 DECEMBER 1984

CIVIL PROCEDURE: *Interim injunction - Ex parte application for - Granted - Application to set aside injunction - Refused - Whether injunction restrains breaches of subsisting contract.*

The Kelantan State Economic Development Corporation (SEDC) granted a timber concession to the defendants who in turn entered into a written agreement dated 16 October 1982 with the plaintiff (contractor) requiring the plaintiff to fell logs and remove timber from particular portions of the concession (contract area). The plaintiff issued a writ on 9 July 1984 (which was served on 11 July 1984) and claimed for (i) an order for specific performance of the terms and conditions of the agreement (ii) an order for an interim injunction restraining the defendants from removing timber felled by the plaintiff and or his contractor from the contract area, without the written consent of the plaintiff and restraining the defendants from disposing to third parties or dealing with the contract area without written consent of the plaintiff.

The plaintiff in his affidavit stated *inter alia* that the defendants had without his knowledge and consent and without due authority taken away some 1,800 tons of cut timber felled and logged by him and that the defendants had allowed third parties in the contract area. These acts were in breach of the contract and were causing him irrevocable damage.

On the same day the writ was issued a summons-in-chambers was issued by the plaintiff with a certificate of urgency and the *ex parte* application was heard the same afternoon. Upon the usual undertaking in respect of damages an injunction was granted in terms.

The defendants had not entered an appearance to the writ within the prescribed eight day period and the plaintiff went back to the Court on 20 July 1984 requesting for an order to remove and or deal with the said cut timber which was now located at Gua Musang Railway Station. The order was granted and the plaintiff took possession and sold the timber.

On 23 July 1984 the defendants filed an application to set aside the injunction and asked for damages.

Held:
The plaintiff was justified in moving the Court *ex parte* for the injunction and the defendants had no right to remove timber from the contract area. The injunction only restrained the defendants from committing breaches of the contract which still subsists.

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 1, O. 92 r. 4

For the plaintiff/respondent - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku
For the defendants/applicants - Dominic Puthucheary (K.Y. Foo with him); M/s. K.Y. Foo & Co.

JUDGMENT

V.C. George J:

The Kelantan State Economic Development Corporation (SEDC) apparently had the power to do so and granted a timber concession to the defendants (OKS) who in turn entered into a written agreement dated 16 October 1982 with the plaintiff (contractor) whereby the plaintiff was required to fell log and remove timber from particular portions of the concession. The written agreement has to be read with particular attention to the following clauses reproduced here:

> 4. OKS shall forthwith apply for all necessary licences and permits from the relevant authorities to enable the Contractor his servants agents and workmen to enter and carry out felling logging and removal of timber in the Contract Area. OKS shall further mark out the boundary of the Contract Area as expeditiously as possible.
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> 5. The Contractor covenants and agrees to commence felling logging and removing timber from the Contract Area within fourteen (14) days of receipt of notice from OKS that the necessary licences and permits have been obtained from the relevant authorities.
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> 6. The sale and the proceeds of sale of all timber felled logged and removed by the Contractor from the Contract Area shall be governed and distributed monthly as follows:
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> (1) each of the parties hereto shall be entitled to sell half of all such timber to its/his purchasers at the prevailing local market price;
>
> (2) OKS shall be entitled to retain twenty (20%) per centum of the gross proceeds of sale of all timber sold by the parties hereto;
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> (3) after payment thereout to OKS as mentioned in (2) aforesaid OKS shall utilise the balance thereof firstly to pay all royalty and premium payable to the Kelantan State Government and SEDC secondly to pay all operational expenses of the Contractor and lastly to pay any remaining balance to the Contractor.
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> 10. The Contractor shall keep true and accurate records of all timber fell logged removed as well as records of timber sold prices and purchasers.
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> 11. If the Contractor shall make default in any of the following respect, *viz*:
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> (i) if without unreasonable cause he wholly suspends the carrying out of the felling logging and removing of timber in the Contract Area before completion thereof; and
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> (ii) if he fails to observe or perform and comply with any of the provisions in this Agreement or in the Main Contract so far as they relate to the felling logging and removing of timber in the Contract Area;
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> then and if such default shall continue for ten (10) days after a notice specifying the default has been given by OKS to him OKS may without prejudice to any other rights or remedies thereupon by notice terminate summarily the employment of the Contractor under this Agreement.

On 9 July 1984 the contractor caused the writ herein to issue against OKS indorsed for the following claims.

> 1. An order for specific performance by the defendant of the terms and conditions of the agreement dated 16 October 1982 made between the plaintiff on the one part and the defendant on the other part.
>
> 2. An order that the defendant whether by itself or its servants or agents or anyone of them or otherwise be restrained by injunction until Judgment in this action or until further order from doing the following acts or any of them that is to say, from removing from

that portion of the concession area contracted out to the plaintiff timber felled by the plaintiff and/or his contractor without the previous written consent of the plaintiff, and from disposing to third parties or dealing with that portion of the concession area contracted out to the plaintiff without the written consent of the plaintiff.

3. Damages for breach of contract.

4. Costs.

5. Further or other relief.

The writ was served on the defendants on 11 July 1984.

The defendants were given the usual eight days to enter an appearance. They entered an appearance only ten days after the service on them of the writ.

In the meantime the plaintiff had on the very day that the writ was issued caused a summons-in-chambers to be issued and with the aid of a certificate of urgency had it heard *ex parte* that very afternoon when upon the usual undertakings in respect of damages I ordered and directed "that the defendants **PERKAYUAN O.K.S. Sdn. Bhd.** whether by itself or its servants or agents or anyone of them or otherwise be restrained by injunction until Judgment in this action or until further order from doing the following acts or any of them that is to say, from removing from that portion of the concession area contracted out to the plaintiff timber felled by the plaintiff and/or his contractor without the previous written consent of the plaintiff and from disposing to third parties or dealing with that portion of the concession area contracted out to the plaintiff without the written consent of the plaintiff **and it is ordered** that the defendants whether by itself or its servants or agents be restrained from moving or in any way dealing with the approximate amount of 1,800 tons of cut timber which is now lying at the Railway Station yard at Gua Musang until further Order of Court **AND IT IS LASTLY ORDERED** that the costs of this application be costs in the cause."

The plaintiff has supported his application for the interim injunction by his affidavit affirmed on 9 July 1984 wherein he stated *inter alia* that the defendants had without his knowledge and consent and without his authority taken away some 1,800 tons of cut timber that had been felled and logged by him and estimated by him to be worth some RM500,000. He also complained that the defendants had allowed other persons to enter into and fell trees in the concession area that the defendants had contracted out to the plaintiff. He had said that these acts of the defendants were in breach of the terms of the contract and was causing him irrevocable damage.

When the defendants had not entered an appearance to the writ within the prescribed eight days the plaintiff came back to the Court and on 20 July 1984 an order was made giving the plaintiff liberty to "move and/or deal with" the said cut timber which apparently had been located at Gua Musang Railway Station. The plaintiff took possession of and sold the timber.

On 23 July 1984 the defendants filed their application which is the matter now before me whereby they ask for the interim injunction to be set aside and they ask for damages. The grounds they rely on are set out in the summons as is required by the Rules - see O. 32 r. 1 and Form 62. It is further noted that the defendants have not made any indorsement in the summons to the effect that they would be relying on any supporting affidavit.

En passant I pause to observe that there appears to me to be a lamentable prevalence for solicitors to ignore the requirements of the procedural rules and to lean heavily on the Courts' inherent powers reiterated in O. 92 r. 4 of the Rules of the High Court.

The affidavits that were read in support of the defendants' application were that of one Datuk Ong Kian Seng, the Managing Director of the defendant company affirmed and filed on 17 September 1984 and of one Ong Teng Buey affirmed on 17 September and filed on 18.

That the defendants had entered into the written agreement of 16 October 1982 with the plaintiff and that that agreement continues to subsist is admitted by Datuk Ong. That the defendants had removed the cut timber (but said to be some 1,300 tons and not, 1,800 tons) is also admitted.

Since the plaintiff had already taken possession of the timber at Gua Musang and had sold it, setting aside that part of the order restraining the defendants from moving or dealing with that timber serves no purpose. In any event under the terms of the contract it was for the plaintiff "to fell log and remove timber from the Contract Area". Under the terms of the contract the defendants had no business removing the cut timber as they did and having done so without informing the plaintiff that they were going to do so, the plaintiff was perfectly justified in moving the Court *ex parte* for the interim injunction.

As to the other part of the order which is the first limb of the interim injunction, it does nothing more than restrain the defendants from committing breaches of the terms of the contract and so long as the contract subsists I can see no reason for the defendants to complain that they are restrained from committing breaches of it.

In the circumstances I see no call for me at this stage to go any deeper into the matter.

The application is dismissed with costs.

Also found at [1985] 1 CLJ 174